Supreme Court, U.S.
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In The

# Supreme Court of the United States

ELEANOR BREITINGER AND JOHN BARON,

*Petitioners,*

v.

STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of New Jersey**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, under *Palazzolo,* a reasonable investment-backed expectation can be inherited from the property's previous owner.

2. Whether notice of a pre-existing regulation prohibits a subsequent property purchaser from inheriting a previous property owner's reasonable investment-backed expectation.

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## PETITION FOR WRIT OF CERTIORARI

Eleanor Breitinger and John Baron respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

## OPINIONS BELOW

The decision to deny certification by the Supreme Court of New Jersey is reported at 182 N.J. 139 (2004); it appears in Appendix C. The decision of the Superior Court of New Jersey (Cape May County) is unreported; it appears at Appendix A.

## JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on October 4, 2004. Petition Appendix (Pet. App.) at C-1. On December 20, 2004, Justice Souter granted petitioner's timely application to extend time within which to file the petition to and including March 5, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall

any State deprive any person of life, liberty, or property, without due process of law."

## STATEMENT OF THE CASE

This case concerns a parcel of waterfront property purchased by petitioner Eleanor Breitinger in 1989. The property is located in Avalon, Cape May County, New Jersey. The acquisition was what is referred to as a Deed in Lieu of Foreclosure because Mr. Breitinger had held the tax sale certificate for the property and acquired it in his wife's name in lieu of foreclosing on the property as permitted by law. Neither Mr. Breitinger nor Mrs. Breitinger knew anything about wetlands up until that time.

### A. Factual Background

The property consists of two undeveloped waterfront lots located on a man-made lagoon surrounded by high end residential development. All of the property is dry most of the day. Fresh water and coastal wetlands have been regulated in the State of New Jersey for decades prior to this purchase. The property in question is one of the only residentially undeveloped lots along a large lagoon in Avalon, New Jersey. The subject lots are located in the Borough of Avalon, in Cape May County, New Jersey. They are designated as lots 68.01 and 68.02 in block 38.05. They are adjacent to one another and rectangular in shape, each being 25 feet by 110 feet. Together they have 50 foot frontage along Ocean Drive which is also known as Third Avenue. On the northwesterly side there exists waterfront on Porpoise Bay. The property in question has been determined to consist almost entirely of wetlands which are

regulated by the Department of Environmental Protection. ["DEP"]

After acquiring the undisclosed parcel, which under local land use law could support a waterfront home that would be worth today over $1 million, the petitioners sought to obtain necessary permits from the DEP that would allow the construction of the home. To their disappointment, the applications were denied because of the existence of wetlands on the property.

The petitioner's consultant submitted an application to the DEP to have the property developed to construct a single-family house. App. B-3. This development was consistent with other properties in the area. *Id.*

The DEP denied the application citing a prohibition under the state wetlands regulations. App. B-3. In discussing potential development uses, the DEP stated it would only permit a one-slip dock on the property. App. B-2. The dock would effectively be useless considering its location on a parcel of land which is dry the majority of the day. The State estimated the current value of the property to be $16,500, according to the State's expert. *Id.* An appraiser commissioned by the petitioners reported the market value of the property, with potential development, to be $578,000. App. B-4. Presently, given the current housing market, the property alone is estimated to be worth over $1 million. The value difference between the appraiser's estimated value and the value produced by the State represents a loss of over 97% of the property value, which the petitioner's argue to be a taking under the Fifth Amendment.

### B. Judicial Proceedings

After exhausting all administrative remedies, petitioners filed a lawsuit alleging that their property had been "taken" by the State of New Jersey, inconsistent with both the Federal and New Jersey Constitutions. App. A-4. The Honorable Joseph Visalli, J.S.C., New Jersey Superior Court in Cape May County, granted a motion for summary judgment filed by the State of New Jersey. The trial court found that no taking had occurred because the petitioners acquired the property after it had been regulated by New Jersey as wetlands and the trial court believed the current value of the property being $16,000 was a reasonable investment-backed expectation for the property that was purchased for $726. App. B-8. This judgment was affirmed by the Appellate Division. App. A-11. The petitioners then appealed to the New Jersey Supreme Court. The certification was denied. App. C.

The issue in the present case is the need for this Court to develop a definition of reasonable investment-backed expectation in order for the lower State and Federal Courts to implement this Court's holding in *Palazzolo. Palazzolo v. Rhode Island Coastal Commission*, 533 U.S. 606 (2001).

## REASONS FOR GRANTING THE WRIT

### I. WHETHER, UNDER *PALAZZOLO*, A REASONABLE INVESTMENT-BACKED EXPECTATION CAN BE INHERITED FROM THE PROPERTY'S PREVIOUS OWNER.

In this Court's decision in *Palazzolo vs. Rhode Island Coastal Commission*, 533 U.S. 606 (2001), this Court held

that despite the fact that Mr. Palazzolo was aware or should have been aware of a regulation which would have precluded development on his property when he acquired title to the property, he could still assert that he possessed a reasonable investment-backed expectation that had been defeated by the denial of the regulatory permit allowing development. *Id.* at 630, 632. *Palazzolo* was a significant decision because lower courts up until that time had been taking various competing positions as to whether or not one who acquires title, after a debilitating regulation, will have the right to assert such a claim.

However, the facts in *Palazzolo* are somewhat unique in that Mr. Palazzolo had always had some involvement with the property. For many years, well before any regulatory impediments existed, the property was owned by a sole shareholder corporation in which the sole shareholder was Mr. Palazzolo. *Id.* at 604. He conveyed title from the Corporation to himself personally after the offending regulation became law and for that reason this became an issue. *Id.*

What happens when a person who claims his property has been taken by the government never had any connection to the property when the offending regulation did not exist? That is a very common fact scenario in these cases. Petitioners seeking relief such as Mrs. Breitinger and John Baron, would like to believe that the holding in *Palazzolo* applies to them as readily as it would to Mr. Palazzolo. However, courts have been inclined to point out that *Palazzolo* was encumbered by its quirky and potentially limiting fact pattern.

In point of fact, there is nothing in this Court's decision in *Palazzolo* that suggests this Court intended the

ruling on this issue to be limiting. However, in the instant case, the *Palazzolo* precedent was given no effect whatsoever and the lower court allowed the state to avoid a taking claim simply because at the last minute, on the eve of trial, the DEP offered the right to build a free standing dock on predominantly dry land. Petitioners feel this is deminimus and valueless.

There is no reason why the holding in *Palazzolo* should not apply with the same weight and authority to Mrs. Breitinger and Mr. Baron as it did in the *Palazzolo* case. The fact that the purchase price was $726.00 makes it easier for the courts below to ignore the law and say that any use, no matter how frivolous and silly, is enough to void the need for just compensation.

The risk is that such an interpretation will erode the weight of authority that this Court wanted to impose, embodied by the *Palazzolo* ruling. There has never been a case where the purchase price of a piece of property has been held to be dispositive as to what a reasonable investment-backed expectation would be for that piece of property. Indeed, it is obvious that persons sell property at below market value for an unlimited number of reasons; ranging from the inability to fight the government in a takings case, such as the instant matter, to instances of divorce, death, and financial failing. To hold that a purchase price can solely be dispositive of reasonable investment-backed expectation makes the analysis a fast and easy one step process. This determination does not follow the historical view of investment-backed expectation.

Under the *Palazzolo* decision, the petitioners should have been given a fair chance at establishing that their

reasonable investment-backed expectations have been diminished as a result of the government action. The fact that twenty years have elapsed between the enactment of the wetlands law in New Jersey and the purchase of the property is of no moment. This Court has made it clear that purchasers who buy property after the enactment of a regulation should still be given their day in court when there is no real value left.

It is particularly important that this Court grant certiorari for this case because a similar problem will reoccur time and time again. This type of problem occurs where a relatively small parcel of land is implicated. The government is aware that in such a case, there are few lawyers who are willing to accept a takings case and advance the very important constitutionally protected rights of the property owner because the value does not usually warrant that kind of effort. Therefore, the ability for the government to abuse citizens is there and that abuse occurs all of the time.

Citizens must be protected from this kind of serious abuse. While the concept of a regulatory taking in the abstract sounds like a term from academia, in real life there is very little that the government can do that can be more personally debilitating and offensive than to take a person's property away from him without paying for it. There has been no guidance on this very important issue and, unfortunately, the economics of the case usually preclude victims of this abuse from ever having a day in court. Strong, unequivocal guidance is needed from this Court to determine a proper standard for property values in situations such as this.

## II. POLICY CONSIDERATIONS SUPPORT A DECISION WHICH PERMITS A PROPERTY OWNER TO INHERIT THE REASONABLE INVESTMENT-BACKED EXPECTATIONS OF THE PRIOR PROPERTY OWNER.

It has been long established that government regulations prohibiting all economically beneficial or productive use of land constitute a taking for which compensation is constitutionally required. *Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003, 1015 (1992). The *Lucas* decision established what is referred to as a categorical taking, which exists when all value of a property is taken as a result of government regulation. This Court found a 95% diminution as "one step short of complete" or total deprivation, and a value that could result in a taking under a *Penn Central* analysis. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1997).

There exists no precise guide or formula for determining when the impact of a government regulation requires compensation by the government. *Id.* at 124. Where slight use of a property remains after a regulation, as in the instant case, a three prong analysis is employed to determine whether or not a compensable taking results under *Penn Central*. *Id.* The three prong test evaluates: (1) the character of the governmental action, (2) the regulation's economic impact on the land owner, and (3) the extent to which the regulation interferes with distinct investment-backed expectations. This Court stated that the degree a regulation interferes with "distinct investment-backed expectations" is a significant factor in deciding whether the measure has taken private property in violation of the Fifth Amendment of the United States Constitution. *Id.*

As for the second prong of the *Penn Central* analysis, petitioners anticipated that they would be allowed to construct a residential home on their property. The *Penn Central* finding used the words "reasonable" to describe the economic returns sought by the property owner. *Id.* at 136. The term "reasonable" invokes the "primary expectation . . . of the use of the parcel." *Id.*

This Court, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001) considered the relevance of an owner's takings challenge when the owner purchases the property with notice of pre-existing regulations. *Id.* This Court ruled that notice of a pre-existing regulation does not prohibit a new property owner from bringing a takings claim. *Id.* at 627, 632-33. The decision stated, "the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking." *Id.* at 637. The Rhode Island State Supreme Court held that, considering the regulations, Mr. Palazzolo could not reasonably have expected to engage in the proposed development plans and that his "lack of reasonable investment-backed expectations was dispositive in the case." *Id.* at 717. This Court, in reviewing the lower court's ruling, stated that the Rhode Island Supreme Court's joint treatment of the *Lucas* and *Penn Central* claims "amounted to a single, sweeping, rule: A Purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Id.* at 626. In rejecting the Rhode Island Supreme Court decision, this Court held that notice of the pre-existing regulation by Mr. Palazzolo did not prevent his right to bring a *Penn Central* takings claim. *Id.* at 632. This Court opined,

> Were we to accept the State's rule, the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A state would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

*Id.* at 613.

This Court was united as to the proposition that the existence of notice of a prior in time regulation does not preclude a successive interest holder from challenging a regulation as a taking.[1] A division existed between Justice Scalia and Justice O'Connor in their interpretations of the effects of notice and a successive interest holder's right to challenge pre-existing regulations. *Id.* at 636. Justice O'Connor maintained that the owner's notice of an existing regulation was significant. *Id.* at 632. Justice Scalia, in disagreeing, was concerned about an investor who might purchase property with the expectation of litigating a takings claim to ultimately receive a windfall. *Id.* at 636. Justice Scalia further stated that by denying compensation for lack of an investment-backed expectation, the approach would give the malefactor the benefit of its malefaction. *Id.*

The *Palazzolo* decision, while prohibiting an outright ban on takings claims when there is pre-existing notice by a property owner, still requires further determination as to

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[1] Carol Nicole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claim after Property Transfers*, 36 Conn. L. Rev. 7, 31 (2003).

the effect a reasonable investment-backed expectation has on new owners and how far courts must go back to decide where this expectation can occur. The discussion between Justices Scalia and O'Connor cited above leaves open the question as to what extent a property owner's reasonable investment-backed expectations factors into either a *Lucas* or *Penn Central* approach. Since the *Penn Central* holding, both federal and state courts are divided on how the doctrine of investment-backed expectations should be applied.[2] This case is an opportunity for this Court to fully explain the doctrine of investment-backed expectations.

Presently, there lacks proper guidance as to whether a property owner who inherits property for one dollar, or as in this case, purchases land in a tax certificate auction for a few hundred dollars, is entitled to the same investment-backed expectation as someone who purchased it at market price. Max Gibbons, *Of Windfalls and Property Rights: Palazzolo and the Regulatory Takings Notice Debate*, 50 UCLA Law Rev. 1259, 1272 (2003). This Court has not gone beyond the assertion that the expectation must be more than a "unilateral expectation or an abstract need" and be rooted in "justice and fairness." *Id.*

The *Palazzolo* opinion discussed the role of reasonable investment-backed expectation in entitlements to private property and the notice of regulatory restrictions to the

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[2] Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, 27 Urban Law. 215, 249 (1995); *see, e.g.*, R.S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?* 9 N.Y.U. ENVT'L L.J. 449, 68 (2001) ("Neither courts nor commentators have been able to agree on the meaning or applicability of investment-backed expectations in takings law.")

investment-backed inquiry. *Id.* at 632-33. However, this Court did not definitively decide what role notice has under the balancing test of *Penn Central.* Brown, *supra* note 1, at 36.

Recently, in *Commonwealth Edison Co. v. United States,* 271 F.3d 1327, (Fed. Cir. 2001), the utility company argued that Act 42 U.S.C. § 2297g-1 constituted an impermissible taking of the company's property without just compensation. *Id.* at 1330. This was based upon the ground that a government imposed money payment cannot result in a taking. *Id.* The Third Circuit Court considered three factors relevant to the determination of a party's reasonable expectations: (1) whether the plaintiff operated in a "highly regulated industry"; (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have "reasonably anticipated" the possibility of such regulation in light of the "regulatory environment" at the time of purchase. *Id.* at 1348.

The decision in *Commonwealth Edison Co.* led to the decision in *Chancellor Manor v. United States,* 331 F.3d 891 (2003). In *Chancellor Manor*, the current owners of a residential property were subject to regulations promulgated by the United States Department of Housing and Urban Development and brought a claim for breach of contract and regulatory taking. *Id.* at 893. During the ownership period, the regulations governing low-income housing changed by removing the right of a property owner to prepay a mortgage loan and remove property from the low-income program. *Id.* at 894. The owners claimed they had suffered an economic loss. *Id.*

In analyzing the takings analysis of the *Penn Central* factors, the *Chancellor Manor* court stated that objective factors must be used when determining whether an existing general law can limit economic use of a property. *Id.* at 904. The court, in citing *Commonwealth Edison*, looked at what a reasonable owner would have expected by stating, "the critical question is what a reasonable owner in the Appellants' position should have anticipated . . . the point in time when the analysis is conducted is the time at which the complaining party entered into the activity that triggered the obligation, specifically when the Appellants entered the programs." *Id.* at 904.

The trial court in *Breitinger* determined the reasonable investment-backed expectation to be the amount invested in addition to other factors. App. A-11. The other factors included the purchaser's history of purchasing tax sale certificates and the trial court's determination of the reasonableness of the purchase price. App. B-2,3.

The *Breitinger* decision was affirmed by the Appellate Court. App. B-10. Citing the opinion of the trial court, the Appellate Division addressed the reasonable investment-backed expectation issue as follows: "A buyer does not necessarily inherit a predecessor's reasonable investment-backed expectations. These expectations are necessarily tied to the petitioner's intentions at the time of purchase." App. A-8. The Appellate Division observed that the regulations protecting the wetlands had been in effect for many years and therefore the petitioners had constructive notice that they would not be able to develop the property due to the coastal wetlands regulations. App. A-9.

This Court should grant this petition because a determination is needed regarding the effect of notice on

reasonable investment-backed expectation under *Lucas* and *Nolan*. The ambiguity has left the state courts with the responsibility of applying their own subjective factors to the issue. The term reasonable investment-backed expectation has been seen as ambiguous by scholars and courts alike. Gibbons, 50 UCLA Law Rev. at 1272; see also Radford and Breemer, *supra* at note 2. It is unclear what amount a property owner who has invested little will be entitled to gain. *Id.* This ambiguity has led to diverse lower court rulings. Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 Urban Law. 735, 767 (1988). Specific problems arose from investment-backed expectations and the ability of a new property owner to make a profit from the purchase of a new property. *Id.*

The current methods of determining reasonable investment-backed expectations may discriminate against a legitimate property owner who purchases property at a non-market price, such as the case in *Breitinger*.[3] Every day people buy land for various prices which could include one dollar or a few dollars at a tax certificate sale. As the *Breitinger* case illustrates, if the purchase price paid for a property is not what the specific court considers "reasonable", the purchaser is punished.

The breadth of the United States and New Jersey case law decisions have held that a petitioner has the same rights as his predecessor. *Nollan vs. California Coastal Commission*, 483 U.S. 825, 833 n. 2 (1987) (holding that current property owners are transferees of the predecessor's full

[3] Richard Breitinger purchased his property for $726 through a tax sale certificate while current market prices listed the property as worth between $14,000-16,000, undeveloped. App. B-2.

right to the property so that the owners' rights are not diminished by their having acquired the property after adoption of regulations which affect the taking). This logic falls in line with cases such as *Breitinger* in which a property owner should be permitted to inherit the expectation of the previous owner and not be penalized for gaining the property at a better than market price.

Granting this petition is appropriate to create a working definition for reasonable investment-backed expectation to be used in future takings cases. A petitioner should reasonably expect to be able to utilize his property in the same manner that his immediate predecessor could, and thus his distinct investment-backed expectations are linked to an immediate predecessor's developmental rights and investment expectations. There needs to be an expansion of the reasoning of *Palazzolo* and a meaningful check on discrimination against a non-market price purchaser of property that purchases their land at non-traditional prices.

## CONCLUSION

The petition for writ of certiorari should be granted.

DATED: March, 2005.

Respectfully submitted,

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## APPENDIX A

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-426-03T5

ELEANOR BREITINGER and
JOHN M. BARON, ESQ.,

Plaintiffs-Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant-Respondent.

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Argued May 25, 2004 – Decided

Before Judges Conley and Weissbard.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, CPM-L-286-98.

Stuart Lieberman argued the cause for appellants. (Lieberman & Blecher, attorneys; Mr. Lieberman, of counsel; Mara Epstein, on the brief).

Brian Weeks, Deputy Attorney General, argued the cause for respondent (Peter C. Harvey, Attorney General, attorney; Patrick DeAlmeida, Deputy Attorney General, of counsel; Mr. Weeks, on the brief).

PER CURIAM

This is an inverse condemnation case. Plaintiffs appeal the trial judge's grant of summary judgment dismissing their claims of inverse condemnation against defendant Department of Environmental Protection (DEP). They

contend that the trial judge erred because DEP's regulations and its actions allowing them only to construct a one-slip dock and not a house on pilings on their bay-front property – a marshy beach, with wetlands and intertidal shallows, that was partially submerged only during high tide – resulted in both a categorical and regulatory taking.

Before his death in January 2003, Richard Breitinger, Eleanor's husband, had purchased and sold many tax sale certificates. Plaintiff John M. Baron was Richard's former attorney who handled some of the foreclosures of those properties, including the property at issue here. In October 1989, Richard purchased a tax sale certificate for the subject property, located in the Borough of Avalon. He subsequently obtained that property from the former owner by a deed in lieu of foreclosure for $726, representing $725 in back taxes plus $1 for the lots. The property deeded in Eleanor's name, consists of two 25 feet by 110 feet lots. In 2002, it was assessed at $14,400.

At the time of the purchase, the property was not a conforming building lot.[1] Indeed, it contains significant mapped coastal wetlands and intertidal shallows and flats. The property is below road grade and partially flooded with tidal water during high-tide. The tidal range is three-feet to four-feet deep for about four to five hours a day. Because there are two high tides and two low tides every day, the property is under water about two and a half hours at any given high tide, with one of those tides being in the middle of night. At low tide, most of the property is dry, but moist, "like a mud flat." It is included in the

[1] The property was purchased in 1953 by the former owner who, presumably, could have at that time built a house on it.

"Designated Special Flood Hazard Area Zones A7" as identified on the map of the Federal Emergency Management Agency. Although located within Avalon's R-2A Residence District which allows construction of detached single-family and two-family dwelling units, public parks, playgrounds, recreational areas, schools, libraries, churches, and municipal buildings, the property has insufficient land to construct a single-family residence or other principal use. It can, however, be improved with construction of a dock, which is a permitted accessory use.[2]

After unsuccessfully trying to sell the property, the Breitingers applied to DEP for various permits to fill it and construct a single-family house on piers and bulkheads. In May 1996, DEP denied their application. In doing so, DEP found that they had failed to address and demonstrate compliance with various agency regulations, and that, in any case, the project failed to meet the regulatory conditions required for construction on wetlands (*N.J.A.C.* 7:7E-3.27), intertidal and subtidal shallows (*N.J.A.C.* 7:7E-3.15), and wetland buffers (*N.J.A.C.* 7:7E-3.28). On their administrative appeal, the denial was upheld, first by an Administrative Law Judge, and then by the Commissioner of DEP. The record does not disclose whether this denial was further appealed.

Thereafter, the Breitingers filed their condemnation complaint.[3] During the initial stages of the litigation the

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[2] Most of the lots in the area are developed with duplexes and a single-family homes. There are two vacant lots to the northeast of the property.

[3] Eleanor was the original record owner of the property. Baron has one-third interest in it which he obtained from Eleanor for $1 in return for legal fees. The complaint originally named only Richard and Eleanor

(Continued on following page)

trial judge directed DEP to design a dock for plaintiffs and directed the plaintiffs to file a permit for such dock. The complaint was dismissed without prejudice. This attempt to resolve the matter was not successful and the litigation was reinstated. Plaintiffs contended the proposed dock was not feasible and the property was of minimal value. DEP, on the other hand, asserted to the contrary. In ultimately granting summary judgment, the judge noted that plaintiffs purchased the tax sale certificate in 1989 for $726, and that:

> The DEP's appraiser has since valued the property as is at $16,500. Plaintiffs' appraiser values the property at $10,000. Plaintiffs' neighbors have twice offered to purchase the property as is for $14,500. The DEP has submitted evidence that building a dock on the property would only increase its value, and that such private recreational docks are in demand in the real estate market in Cape May County. Plaintiffs have failed to show they could reasonably have expected, in 1989, to build a house in the wetlands.

As to a categorical taking, the judge found that plaintiffs had not demonstrated that DEP had prohibited all economically viable uses of the property. The judge stated:

> In this case, the land has some value as is, and the dock will increase its value. Plaintiff[s are] blurring this category with the investment-backed expectation, essentially arguing the difference in value between the property with the house (.$600,000) and the property with a dock

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as plaintiffs. Richard died during the course of the litigation and Baron was added as a plaintiff.

> (.$20,000) results in a finding that there is *no* economically viable use of the property. The State is not obligated to compensate a plaintiff for the *most profitable* use of the property.

As to a regulatory taking, the judge applied the three-prong test laid out in *Penn Central Trans. Co. v. New York City*, 438 *U.S.* 104, 98 *S.Ct.* 2646, 57 *L.Ed. 2d* 631 (1978) *Penn Central*), as interpreted in *East Cape May Assocs. v. State Dep't of Envtl. Prot.*, 300 *N.J. Super.* 325, 336-37 (App. Div. 1997) (*East Cape May I*). Because neither party raised the third factor, the judge addressed only the third two factors – whether the regulation deprived plaintiffs of virtually all economically viable uses of the property and whether plaintiffs had had any distinct investment-backed expectations at the time of acquiring the property that were destroyed by the force of the regulation.

As to the first *Penn Central* factor, the judge rejected plaintiffs' claim that the denial of the permit to build a house left the property virtually useless. He said:

> The property at issue has been appraised to the value of $10,000-$16,000, with an offer to buy the property at $14,000. The State has already agreed to issue permits to build docks, and the Borough of Avalon has indicated it will allow a hardship variance. With the dock added to the waterfront, the appraisers estimate the value to increase several thousand dollars (the exact amount is unclear). Comparatively speaking, the value of the property with or without a dock is already a considerable return on plaintiffs' investment, and at least of some economic use.

The judge also rejected plaintiffs' claim that the United States Supreme Court in *Lucas v. South Carolina Coastal*

*Council*, 505 *U.S.* 1003, 112 *S.Ct.* 2886, 120 *L. Ed. 2d* 798 (1992), had held that a dock is of such minimal value that limiting a property's use to building a dock will always constitute a loss of all or virtually all economically beneficial use. The judge reasoned:

> [I]n *Lucas*, the plaintiff bought the property, located in a residential neighborhood, for nearly $1,000,000. Because the value of the undeveloped property did not even approach the valuation of the developed property, use of the property to build a dock or set up tent sites was so comparably minimal that the Court found a categorical taking. That finding should not be interpreted as an absolutist position by the Supreme Court that a dock will never be a viable use of any property. This court believes it is the draconian differences between the investment and the later property value that is the measurement of the loss and the proposed use. Plaintiff is not necessarily entitled to a windfall as a result of a governmental regulation.

As to the second *Penn Central* factor, the judge first agreed with plaintiffs that some rights run with the land; he cited (1) *Urban v. Planning Bd. of Borough of Manasquan*, 124 *N.J.* 651, 656-57 (1991) (nonconforming rights); (2) *Karam v. State, Dep't of Envtl. Prot.*, 308 *N.J. Super.* 225, 242 (App. Div. 1998), *aff'd o.b.*, 157 *N.J.* 187, *cert. denied*, 528 *U.S.* 814, 120 *S.Ct.* 51, 145 L.Ed. 2d 45 (1999) (right to fair compensation when property is zoned into inutility by zoning law changes), and (3) *Moroney v. Mayor & Council of Borough of Old Tappan*, 268 *N.J. Super.* 458, 464 (App. Div. 1993), *certif. denied*, 136 *N.J.* 295 (1994) (right to relief for undersized lot created by zoning regulation). But he rejected plaintiffs' arguments that purchasers

step into the shoes of their predecessors-in-title in all respects. Specifically, he rejected plaintiffs' contention that they should be able to recover the value of the property with a house on it because their predecessors could have built a house on the property. He stated:

> [D]evelopment rights are not absolute: when conditioned on obtaining permits or other government approval, new purchasers may be bound by later restrictions. To hold otherwise would mean that any changes in zoning laws or environmental regulations would be utterly meaningless, because all purchasers simply would determine development rights and property values by tracing back to the development potential before the governmental restriction, regardless of their actual expectations at the time of purchase. . . . The courts usually examine the plaintiffs' reasonable, "distinct, investment-backed expectation" before the implementation of the regulations to determine just compensation.
>
> Therefore, it is more sensible to understand that while a buyer generally "steps into the shoes" of his predecessor in title with respect to property rights, *a buyer does not necessarily inherit a predecessor's reasonable investment-backed expectations. These expectations are necessarily tied to the plaintiffs' intentions at the time of purchase.*
>
> [Emphasis added.]

As to evaluating plaintiffs' intentions at the time of purchase, the judge noted that if the standard was subjective, Richard's affidavit, filed before his death, that he bought the property with the intent to build a house on it might be sufficient to satisfy the second prong, but that if the

standard was objective, any evidence of intent could be examined, including Richard's statements and his actual investment and conduct. After analyzing *Lucas v. South Carolina Coastal Council, supra,* 505 *U.S.* 1003, 112 *S.Ct.* 2886, 120 *L.Ed.* 2d 798; *Moroney v. Mayor & Council of Boro. of Old Tappan, supra,* 268 *N.J. Super.* 458 (App. Div. 1993), and *East. Cape May I, supra,* 300 *N.J. Super.* 325, the judge concluded that the standard was objective for evaluating a party's reasonable expectation. Consequently he stated:

> In the present matter, the State asserts the Breitingers did not perform any due diligence before buying the property, and plaintiffs have not offered any evidence to the contrary. Had plaintiffs viewed the property, they would have realized it was an internal corner lot, partially submerged in marshes. In an area heavily restricted by the CAFRA regulations, which have been published since the early 1970's, the fact that the property was clearly located in wetlands, in addition to the extraordinarily low purchase price, certainly should have provided reasonable notice to the buyers that the property was not available for residential development. In *Ka[r]am, [v. State, Dep't of Envtl. Prot.,* 308 *N.J. Super.* 225, 241 (App. Div. 1998)], the Appellate Court stressed that the regulations had been in place for many years and the plaintiffs had constructive notice of the development, as part of the finding that plaintiffs could not reasonably expect to develop their property. *Ka[r]am, [supra,]* 308 *N.J. Super.* at 241. Likewise, it appears from the record that the Breitingers bought a lot that they had never visited, and had performed no investigation, for $726. The Breitingers had purchased several hundred tax sale certificates over the years, and were well versed in the business of real estate investment. It is simply not

> persuasive that Mr. Breitinger could reasonably believe he was purchasing a feasible lot for building a home in Avalon, an upscale coastal community, for $726, with absolutely no due diligent inquiry into the condition or legal status of his "investment". Mr. Breitinger certifies in his affidavit that he had such a belief, and while the court will not question that it may have been *sincere,* the court cannot find it *reasonable.* "[A] 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.,* 467 *U.S.* 986, 1005-06 [, 104 *S.Ct.* 2862, 2874, 81 *L.Ed.* 2d 815, 834] (1984), quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 *U.S.* 155, 161[, 101 *S.Ct.* 446, 451 66 *L.Ed.* 2d 358, 364-65] (1980). The court agrees with the State that Mr. Breitinger's reasonable investment-backed expectation would be the redemption of the tax sale certificate, with 18% interest or the market value of the property. As such, plaintiffs are entitled only to the appraised value of the land in its present condition, or with any improvements made by the plaintiffs, and not the appraised value of the property if developed.

Accordingly, the judge held that plaintiffs failed to demonstrate by clear and convincing evidence that they suffered a taking, and he granted DEP's motion for summary judgment.

We agree entirely with this rationale. We have considered plaintiffs' contentions on appeal and found them to be of insufficient merit to warrant further opinion. R. 2:11-3(e)(1)(E). Affirmed for the reasons set forth by Judge Joseph C. Visalli in his August 28, 2002, written opinion.

**APPENDIX B**

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS**

**SUPERIOR COURT OF NEW JERSEY**
**LAW DIVISION**
**CAPE MAY COUNTY**

**TO:** **Stuart J. Lieberman, Esquire**
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**Princeton, NJ 08540**

**Brian Weeks, Deputy**
**Attorney General**
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**Trenton, NJ 08625**

**CASE:** **Richard Breitinger, et al v State of NJ DEP**

**DOCKET:** **L-286-98**

**NATURE OF APPLICATION:** **Summary Judgment**

**MEMORANDUM OF DECISION ON MOTION PURSUANT TO RULE 1:6-2(f)**

(Filed Aug. 28, 2003)

Having carefully reviewed the moving papers and any response filed, I have ruled on the above motion as follows:

This matter arises from motions for summary judgment by both parties. When property is deprived of all beneficial use to owner, property has been confiscated and compensation must be paid. *U.S. Const. Amends.* V, XIV. A regulation may constitute a taking if it destroys the value

of property, even without a direct physical invasion. *Pennsylvania Coal Co. v. Mahon,* 260 *U.S.* 393 (1922).

Plaintiffs allege they have suffered a taking by the New Jersey Department of Environmental Protection's refusal to issue a permit to build a house on a lot located in a protected wetlands area. Plaintiffs allege the taking is proven by clear and convincing evidence either under the categorical regulatory taking analysis, or the *Penn Central* regulatory taking analysis.

The plaintiffs purchased the tax sale certificate on a wetlands area in 1989 for $726. Plaintiff Richard Breitinger had previously bought and sold many tax sale certificates, earning the statutory interest and fees. When the owner did not redeem the certificate for this property, plaintiff foreclosed on the property and then applied for permits to fill and build a house on the wetlands. The DEP denied those permit applications, since such development activity was and is contrary to State law.

The DEP's appraiser has since valued the property as is at $16,500. Plaintiffs' appraiser values the property at $10,000. Plaintiffs' neighbors have twice offered to purchase the property as is for $14,500. The DEP has submitted evidence that building a dock on the property would only increase its value, and that such private recreational docks are in demand in the real estate market in Cape May County. Plaintiffs have failed to show they could reasonably have expected, in 1989, to build a house in the wetlands.

In January 2003, plaintiffs moved for partial summary judgment, which was denied. The court found that plaintiffs must address each of the three elements of a regulatory

takings claim set out in *East Cape May Assoc. v. DEP.* On April 24, 2003, plaintiffs moved for reconsideration.

Plaintiffs have authenticated the documentation of over 200 tax sale certificate transactions the Breitingers have engaged in within three New Jersey counties since 1989, and they have admitted in an unspecified number of additional such transactions. Plaintiffs have not provided documentation of any other transactions, or any documentation revealing their profit from the tax sale certificates redeemed by the property owners, how many of their tax sale certificate transactions resulted in a foreclosure, how many of those foreclosed properties contained wetlands, or how many of those properties they developed. Plaintiffs have claimed that they either had lost or could not recollect such documents or transactions.

### A. Categorical Taking

The U.S. Supreme Court identified the circumstances where government regulations have effected a "categorical" taking as where the "regulation denies all economically beneficial or productive use of [the] land." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). The Court has already decided this issue in the April 9, 2003 Order, rejecting plaintiff's motion for summary judgment to find a categorical taking. As in the prior Order, the court does not find plaintiff demonstrates the State has prohibited all economically viable uses of the property. In this case, the land has some value as is, and the dock will increase its value. Plaintiff is blurring this category with the investment-backed expectation, essentially arguing the difference in value between the property with the house (~$600,000) and the property with a dock

(~$20,000) results in a finding there is no economically viable use of the property. The State is not obligated to compensate a plaintiff for the *most profitable* use of the property. Gardner v. New Jersey Pinelands Comm'n, 125 N.J. 193, 215 (1991).

### *B. Penn Central* Taking

The *Penn Central* test has been interpreted in New Jersey in *East Cape* May to find a regulatory taking when (1) there was a denial of economically viable use of the property as a result of the regulatory imposition; (2) the property owner had distinct investment-backed expectations; and (3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine. *Penn Central Trans. Co. v. New York City,* 438 *U.S.* 104, 124 (1978); *East Cape May Assoc. v. DEP,* 300 *N.J. Super.* 325 (App. Div. 1997).

Plaintiffs first contend that the denial of the permit to build a house on the lot left the property virtually useless. Diminution of land value by itself does not constitute a taking. *Gardner, supra,* 125 *N.J.* at 210. When looked at in context with reasonable investment-backed expectations, where the diminution is extreme, courts may find a property has been deprived of virtually all economically viable use. *Karam v. NJ DEP,* 308 *N.J. Super.* 225 (App. Div. 1998). As detailed more thoroughly below, this court does not find that plaintiffs' reasonable investment-backed expectation is the value of the property if developed. The property at issue has been appraised to the value of $10,000 - $16,000, with an offer to buy the property at $14,000. The State has already agreed to issue permits to

build docks, and the Borough of Avalon has indicated it will allow a hardship variance. With the dock added to the waterfront, the appraisers estimate the value to increase several thousand dollars (the exact amount is unclear). Comparatively speaking, the value of the property with or without a dock is already a considerable return on plaintiffs' investment, and at least of some economic use.

Plaintiffs argue that *Lucas* indicates a docking is of such minimal value to a property that limiting property use to building a dock will always constitute a loss of all or virtually all economically beneficial use. *Lucas, supra,* 505 *U.S.* at 1009 n.2; 1044. But in *Lucas,* the plaintiff bought the property, located in a residential neighborhood, for nearly $1,000,000. Because the value of the undeveloped property did not even approach the valuation of the developed property, use of the property to build a dock or set up tent sites was so comparably minimal that the Court found a categorical taking. That finding should not be interpreted as an absolutist position by the Supreme Court that a dock will never be a viable use of any property. This court believes it is the draconian differences between the investment and the later property value that is the measurement of the loss and the proposed use. Plaintiff is not necessarily entitled to a windfall as a result of a governmental regulation.

Such a determination leads to the second step in the *Penn Central* analysis: establishing the plaintiffs' reasonable investment-backed expectations. For these purposes, plaintiff argues, the purchaser steps into the shoes of his predecessors in title. According to this logic, there is no limitation to accumulating previous owners' rights. *Kazam* 308 *N.J. Super.* at 242 ("[w]e recognize that rights in property pass from one owner to the next"). At oral argument,

plaintiff counsel stated the transfer in development rights is limited to one transaction, although it is unclear the case law expressly creates such a limitation. Nonconforming rights run with the land, irrespective of changes in ownership. *Urban v. Planning Bd. of Manasquan*, 124 *N.J.* 651, 656 (1991), citing *N.J.S.A.* 40:55D-68. Thus, "the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development." *Kazam, supra*, 308 *N.J. Super.* at 242. *See also Maroney v. Mayor and Council of Old Tappan*, 268 *N.J. Super.* 458 (App. Div. 1993) ("[w]here neither owner of lot at time of adoption of zoning ordinance, which made lot undersized, nor subsequent owner do anything to create undersized lot for which a hardship variance is sought, right to relief possessed by original owner passes to successor in title and such right is not lost simply because succeeding owner bought or contracted to buy with knowledge of the lot size restriction").

Nevertheless, development rights are not absolute: when conditioned on obtaining permits or other government approval, new purchasers may be bound by later restrictions. *Kazam* 308 *N.J. Super.* at 242 ("[w]hile the conditions for obtaining a development permit have undoubtedly become more onerous in the seventy-odd years that have passed since the riparian grant was issued, plaintiffs could not reasonably have expected that they would be immune from all changes in the law during that period."). To hold otherwise would mean that any changes in zoning laws or environmental regulations would be utterly meaningless, because all purchasers simply would determine development rights and property

values by tracing back to the development potential before the governmental restriction, regardless of their actual expectations at the time of purchase. The court does not believe the Appellate Division intended such a chaotic interpretation of *Kazam*. The courts usually examine the plaintiffs' reasonable, "distinct, investment-backed expectation" before the implementation of the regulations to determine just compensation. *East Cape May* 300 *N.J. Super.* at 337.

Therefore, it is more sensible to understand that while a buyer generally "steps into the shoes" of his predecessor in title with respect to property rights, a buyer does not necessarily inherit a predecessor's reasonable investment-backed expectations. These expectations are necessarily tied to the plaintiffs' intentions at the time of purchase.

The next question, then, is the standard of evaluating plaintiffs' intent. If the standard is subjective, then Mr. Breitinger's affidavit, certifying he bought the property with the intent to build a house on the lot, might be sufficient proof. If the standard is objective, evidence of intent may be collected not only in the plaintiff's statement, but by plaintiffs actual investment and conduct. The amount paid for the property is indicative of the presumed worth, and steps taken to evaluate and protect the investment indicate plaintiffs plans for the property. For example, in *Lucas* the plaintiff bought the property for $975,000. *Lucas v. South Carolina Coastal Council,* 505 *U.S.* 1003 (1992). An expectation to build a house on the lot was reasonable, as reflected in the current zoning status of the area, the lack of regulations prohibiting building residential structures on the lot at the time of purchase, and the purchase price. A million dollar investment into a property patently indicates the expectation

that the market values the property at that amount. Similarly, in *Maroney,* plaintiffs paid $100,000 for two properties, spent about $10,000 in improvements to the house on Lot 1 and sold the first lot for $110,000. Because the plaintiffs had not realized a profit from their investment at that point, the court found there still remained an investment-backed expectation in Lot 2, which supported a claim for a taking. *Maroney v. Mayor and Council of Old Tappan,* 268 *N.J. Super.* 458, 467 (App. Div. 1993). In *East Cape May,* the court considered the plaintiffs' history of gradually accumulating the parcels of property because of the high costs of investment, as well as the construction of residential housing units on an adjoining portion of property also owned by the plaintiffs, and their similarity to the plans drawn for the areas protected by the CAPRA regulations. *East Cape May* 300 *N.J. Super.* at 329-30; 337. Viewing the case law, the court is of the opinion that the standard is objective, as it is tied to a party's "reasonable" expectation.

In the present matter, the State asserts the Breitingers did not perform any due diligence before buying the property, and plaintiffs have not offered any evidence to the contrary. Had plaintiffs viewed the property, they would have realized it was an internal corner lot, partially submerged in marshes. In an area heavily restricted by the CAPRA regulations, which have been published since the early 1970's, the fact that the property was clearly located in wetlands, in addition to the extraordinarily low purchase price, certainly should have provided reasonable notice to the buyers that the property was not available for residential development. In *Kazam,* the Appellate Court stressed that the regulations had been in place for many years and the plaintiffs had constructive notice of the

development, as part of the finding that plaintiffs could not reasonably expect to develop their property. *Kazam* 308 *N.J. Super.* at 241. Likewise, it appears from the record that the Breitingers bought a lot that they had never visited, and had performed no investigation, for $726. The Breitingers had purchased several hundred tax sale certificates over the years, and were well versed in the business of real estate investment. It is simply not persuasive that Mr. Breitinger could reasonably believe he was purchasing a feasible lot for building a home in Avalon, an upscale coastal community, for $726, with absolutely no due diligent inquiry into the condition or legal status of his "investment". Mr. Breitinger certifies in his affidavit that he had such a belief, and while the court will not question that it may have been *sincere,* the court cannot find it *reasonable.* "[A] 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.,* 467 *U.S.* 986, 1006 (1984), quoting *Webb's Fabulous Pharmacies. Inc. v. Beckwith,* 449 *U.S.* 155, 161 (1980). The court agrees with the State that Mr. Breitinger's reasonable investment-backed expectation would be the redemption of the tax sale certificate, with 18% interest, or the market value of the property. As such, plaintiffs are entitled only to the appraised value of the land in its present condition, or with any improvements made by the plaintiffs, and not the appraised value of the property if developed.

Finally, because neither party argues the merits of the third factor of the *Penn Central* analysis, the court will not address it.

For the foregoing reasons, the court finds plaintiffs have failed to demonstrate by clear and convincing evidence that

they have suffered a regulatory taking, and therefore the State's motion for summary judgment is granted.

August 28, 2003

Joseph C. Visalli, J.S.C.

**APPENDIX C**

SUPREME COURT OF NEW JERSEY
C-170 September Term 2004
56,580

ELEANOR BREITINGER and
JOHN M. BARON, ESQ.,

Plaintiffs-Appellants,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Defendant-Respondent.

ON PETITION FOR
CERTIFICATION

(Filed Oct. 6, 2004)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-426-03 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 4th day of October, 2004.

/s/ [Illegible]
CLERK OF THE SUPREME COURT

**APPENDIX D**

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| | |
|---|---|
| **ELEANOR BREITINGER AND JOHN BARON**<br>Plaintiffs/Appellants,<br>vs.<br>**STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,**<br>Defendant/Respondent. | *SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION*<br>*DOCKET NO.: A-000426-03T5* |

# APPELLANTS' BRIEF ON THE MERITS

Stuart Lieberman, Esq.
Of Counsel

Mara Epstein, Esq.
On the Brief

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## PRELIMINARY STATEMENT

This case concerns a parcel of waterfront property purchased by Plaintiff Eleanor Breitinger in Avalon, New Jersey in 1989. Shortly after her purchase, Mrs. Breitinger conveyed a 1/3 interest in the subject property to Plaintiff John Baron (hereinafter collectively referred to as "Plaintiffs" or "Appellants"). The property consists of two undeveloped waterfront lots located in a man-made lagoon that is surrounded by high-end residential development. Each lot is twenty feet by 110 feet and contains wetlands but is dry during most of the day. After the purchase of the property, Plaintiffs applied to the New Jersey Department of Environmental Protection ("DEP") for permits to fill in the wetlands and build a house on the property similar to the many other homes that had already been built in the

immediate vicinity. The DEP denied the permits stating that development was not permitted under various statutes, including the Coastal Area Facility Review Act ("CAFRA") and the Coastal Wetlands Act of 1970.

The only development on the lots that the DEP would allow was the building of a small dock. Plaintiffs contend that not only would this be a trivial use of the site, as it represents at least a 97% diminution of property value, but it is also a minimal use as such a dock is only usable as a dock five to six hours per day.

Plaintiffs assert that the DEP permit denial resulted in a categorical takings, or at the very least, that a regulatory takings has occurred as set forth in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978). The Court below found that no takings occurred and this appeal follows.

## PROCEDURAL HISTORY

Plaintiffs own undeveloped lots in Avalon, New Jersey which are subject to CAFRA. The Plaintiffs applied to the DEP for the required environmental land use permits to develop a single family home on the subject property. They were denied by the DEP in May 1996. Pa117.[1]

A hearing was held before the Office of Administrative Law to contest the permit denial and to exhaust available administrative remedies. Following a hearing on December 3, 1997, the Honorable John Tassini, Administrative Law Judge, concluded that "the application does not

[1] Pa refers to Plaintiff's Appendix.

satisfy the above cited Coastal Zone Management rules and was properly denied by the Program." Pa15. Hence, the DEP permit denial was upheld.

A lawsuit was thereafter filed by Plaintiffs in the Superior Court of New Jersey, Law Division, Cape May County against the State alleging that a "regulatory taking" occurred. Pa18.

Complete discovery was undertaken and the matter was listed for trial before the Honorable Joseph Visalli on March 19, 2001.

At trial, the Court dismissed the litigation so that the Plaintiff could apply to the DEP to construct a dock pursuant to an Order of the Court. *See* Pa838. The Order required, among other things, that the State prepare, at its own expense, drawings of a proposed dock that the State proffered it would approve. *See* Pa839. The Order also required that the dock bring no more destruction to the wetlands than would be occasioned by the construction of a dwelling on pilings. *See* Pa840.

The Order requiring that the State perform these tasks was dated March 27, 2001. *See* Pa838. During most of 2001 the State failed to produce a drawing, leading to a Motion by Plaintiffs requesting that the Dismissal be vacated and the trial be reinstated as a result of the State's failure to produce drawings of a permit-pull dock. Finally, on November 12, 2001 the State did produce a drawing of a dock with a single bay, which contrasted with a three to four bay dock originally proffered by the State as potentially available to the Trial Court.

On April 2, 2002, Plaintiffs filed a Motion to Reinstate the Complaint alleging that the costs of constructing the

proposed dock would be approximately $30,000.00 and that was more costly than the value of the dock with four slips, which would be approximately $26,000.00. The Trial Court granted the Motion and reinstated the case. *See* Pa24.

On January 8, 2003, Plaintiffs filed a Motion for Partial Summary Judgment which was denied by the Trial Court. *See* Pa833. Plaintiffs filed a Motion for Reconsideration on April 24, 2003 which was also denied. *See* Pa28.

On August 22, 2003, the Trial Court heard argument on a Motion for Summary Judgment by the State and a Cross-Motion for Summary Judgment by Plaintiffs. *See* T2-8. The Court granted the State's Motion for Summary Judgment on August 28, 2003 and dismissed Plaintiffs' Complaint. Pa42. Plaintiffs' Cross-Motion was denied. *See id.*

STATEMENT OF FACTS

The subject property is located in the Borough of Avalon, New Jersey and consists of two adjacent lots designated as Lots 68.01 and 68.02 in Block 38.05, each twenty feet by 110 feet. *See* Pa7. In 1989, Plaintiffs purchased a tax sale certificate on the subject property and subsequently obtained the property from the prior owner by deed in lieu of foreclosure for $726.00. *See* Pa112. *See also* Pa72. Plaintiffs' environmental consultant submitted an application to develop the property to the DEP on March 21, 1996. *See* Pa3. The applicant proposed construction of a single-family house on pilings. *See id.* Almost every other lot in this area has been developed in this manner. *See* Pa140.

The DEP denied Plaintiffs' permit application, ruling that "development is prohibited under the wetlands rule and was discouraged under intertidal and subtidal shallow rules." *See id.* In addition, the development was also held to be precluded under the wetland buffer rule. *See* Pa4.

According to the State's expert witness, Karl Braun, there is a healthy roll-up of water exchange and absorption of floodwaters on the property. Biota of wetlands and Benthic Community are interrelated and symbiotic and as sprung by Spartina Phragmites and high tide bush, the lots' wetlands are frequently inundated and are of high vigor. *See* Pa8. According to DEP employee Gail Moore, a case manager, there are even more coastal wetlands on the subject property than indicated by the mapped wetlands lines. *See* Pa9. The proposed development would impact coastal wetlands and thus a permit would be required. Ms. Moore stated that in any event, a house could not be approvable on the applicants' lots. *See id.*

Without permits, the current value of the property according to the State's expert is $16,500.00. *See* Pa127. A neighbor has offered to buy the subject property for $14,500.00. *See* Pa682. Metro Appraisal, an appraiser commissioned by the Plaintiffs, opined in a report dated May 5, 2000 that the market value of the lots with development potential, as of that date, was $578,000.00. *See* Pa747. The appraiser had inspected the property and taken pictures of the property. *See* Pa750. Development potential meant residential construction of the nature proposed by Plaintiffs.

Under "Summary of Site Characteristics," the Plaintiffs' appraisal expert noted that the land area is 6,380 square feet with 58 feet of frontage and good visibility. *See*

Pa779. It is regarded as a "wetland requiring a CAFRA building permit for development of a single family dwelling." *See id.* It has water, sewer, gas, and electric available to the property. It does not have any flood zone or drainage issues, and there are "no other detrimental conditions restricting the efficient use or appeal of the property." *See id.* Plaintiffs' appraiser opined, "the subject property would be very marketable with CAFRA building permit for a single family dwelling." *See id.*

According to Plaintiffs' appraiser, "the highest and best use is estimated to be restricted development of a single family dwelling unit on the site." *See* Pa783. A review of aerial photographs shows that the immediate vicinity has been historically developed over the last 50 years. *See* Pa841. The property is one of many properties that surround the Bay. The properties are very attractive, and almost every lot that surrounds the Bay contains a single family dwelling and is fully developed for residential use, the exact use that the Plaintiffs desire for the subject property. *See* Pa140.

A hearing was held before the Office of Administrative Law on December 3, 1997 before the Honorable John R. Tassini, Administrative Law Judge. The Administrative Law Judge found that, "the application does not satisfy the above cited Coastal Zone Management rules and was properly denied by the Program." Pa15.

The subject property remains undeveloped to this day. The DEP will only allow development of a one-slip dock which is virtually useless since the dock would be usable for only three hours daily. *See* Pa830. The current use as a one-slip dock represents a loss of more than 97% in property

value. Therefore, Plaintiffs have been deprived of virtually all economically viable use of their property.

## LEGAL ARGUMENTS

### *I. THE TRIAL COURT ERRED IN HOLDING THAT A CATEGORICAL TAKING HAD NOT OCCURRED*

Government regulations which prohibit all economically beneficial or productive use of land is a taking for which compensation is constitutionally required. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). In *Lucas*, the Court evaluated a regulation that precluded the construction of a single family dwelling on two beachfront lots, and found that the regulation left the property economically valueless and thus constituted a regulatory taking. *See also Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 129 N.J. 221 (1992), *Gardner v. New Jersey Pinelands Comm'n*, 125 N.J. 193 (1991).

*Lucas* establishes a categorical taking when all value is taken from the property. Once it is ascertained that a property has been rendered economically valueless, the Court may find a taking and does not need to make any *further* inquiry; the analysis ends at that point. *Lucas*, 505 U.S. at 1015. *See also Palazzolo v. Rhode Island Coastal Comm'n*, 533 U.S. 606 (2001).

In the instant case, the State asserted and the Trial Court concluded that a categorical taking had not occurred because a dock could be constructed on the property. Pa33. As the State asserts in its own appraisal, this is the only realistic use that is now available for this property because of the DEP's restrictions. *See* Pa148.

The Trial Court wrongfully concluded that the DEP's allowance of a one slip dock defeated Plaintiffs' categorical taking claim. This is an extremely trivial use that the State concocted on the eve of trial solely to avoid a categorical taking. The State merely attempted to preclude a categorical taking by inventing an unrealistic use. Notably, courts have been unwilling to allow such trivial uses to overcome categorical takings claims. *See, e.g., East Cape May Associates v. State of New Jersey, Dept. of Environmental Protection*, 300 N.J. Super. 325, 339 (App. Div. 1997), *aff'd*, 343 N.J. Super. 110 (App. Div. 2001) (pointing out that *Lucas* had previously held the ability to camp or picnic, or build walkways or docking on the subject lots were not sufficient to defeat the claim that plaintiff was deprived of all economically viable use of the subject property).

Additionally, Plaintiffs have repeatedly asserted that not only is a dock itself a trivial use, but a dock on this particular property has virtually no use. Plaintiffs' expert, Charles Kona, has stated in his Certification that the location would only be navigable for approximately three hours daily. *See* Pa830. Although the State's expert, William Castle, opined in his report that there was a minimum period of five to six hours for boating activities, he later admitted during his deposition that he did not consider the effect of a full moon or even the wind. *See* Pa307.

Plaintiff John Baron, an individual who has been to the subject property on numerous occasions, agreed that based upon substantial personal boating experience a dock on the property would be undesirable for boaters because the property is dry for most of the day and this would cause damage to boats docked at the site. *See* Pa494.

Photos taken of the subject property support Plaintiffs' assertion that the majority of the site is dry most of the time. *See* Pa841.

The subject property had a viable economic use as a residential lot, and the State's regulation took away 100% of this lot's residential economic viability. In an attempt to avoid a taking, the State offered a trivial, economically not viable use for the property- a mostly water-less dock. *See* Pa34. This is the same type of use that the Supreme Court in *Lucas* held to be trivial and insufficient to avoid a taking. In accordance with *Lucas*, Plaintiffs respectfully request that this Court find that the Trial Court erred in not finding that the State's offer of a mostly dry, one-slip dock was inconsequential and that the subject property had in fact lost all economically beneficial value as a result of the State's permit denial.

## *II. THE TRIAL COURT FAILED TO PROPERLY APPLY THE PENN CENTRAL CRITERIA IN THIS CASE*

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it became clear that a regulation could constitute a taking if it destroyed the value of property, even if there was no direct physical invasion. "If regulation goes too far it will be recognized as a taking." *Id.* at 415. However, the Court to this day has not been able to calculate a distinct formula or per se rule for determining when a regulation "goes too far."

In *Penn Central*, the United States Supreme Court enumerated three criteria for evaluating a regulation's intrusiveness and whether it went "too far": 1) the character of the governmental action, 2) the regulation's economic

impact on the landowner, and 3) the extent to which the regulation interfered with distinct investment-backed expectations. *Id.* at 124.

*Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1176-77 (1994) explained that the first *Penn Central* criterion required a balancing of the private property owner's liberty interest and the government's protection of the public interest. The second criterion resulted in a "threshold requirement that the plaintiff show a serious financial loss from the regulatory imposition," which came to be known as a denial of "economically viable use of land." *Id.* at 1177. It is noteworthy that the standard was not a total financial loss or a complete denial of economic use of land. Under the *Penn Central* analysis, the owner could retain some use of the land; a taking did not require a total economic deprivation. The crux of the *Penn Central* regulatory takings analysis was the third criterion: interference with distinct investment-backed expectations. *Penn Central* engaged in "essentially ad hoc, factual inquiries." *Id.* at 124.

In the *Lucas* decision, the Supreme Court "carved out a narrow exception to the rules governing regulatory takings for the 'extraordinary circumstance' of a permanent deprivation of all beneficial use." *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 n. 19 (2002). *Lucas* articulated the rule that a categorical taking occurs when government regulations prohibit *all* economically beneficial or productive use of land. 505 U.S. at 1019. It is essential to takings jurisprudence that it is clear that *this is the exception* and the categorical rule would not apply if there was for example a 95% diminution in value as opposed to a 100%. *Tahoe*, 535 U.S. at 330. In responding to Justice Stevens's criticism of

this rule as arbitrary, the *Lucas* majority clarified that it is an error to assume that "the landowner whose deprivation is one step short of complete is not entitled to compensation." 505 U.S. at 1019 n. 8. Indeed, "such an owner might not be able to claim the benefit of [the] categorical formulation, but . . . 'the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." *Id.* Thus, anything less than a total loss of value would require a *Penn Central* analysis. *Tahoe*, 535 U.S. at 330.

*Lucas* also changed the *Penn Central* criterion relating to the character of the governmental action from an ad hoc balancing decision to common law nuisance doctrine. *Loveladies Harbor*, 28 F.3d at 1179. In sum, the *Penn Central* analysis has been interpreted to find a regulatory taking when "(1) there was a denial of economically viable use of the property as a result of the regulatory imposition; (2) the property owner had distinct investment-backed expectations; and (3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine." *Id.* New Jersey courts adopted this analysis in *East Cape May*. 300 N.J. Super at 336-337. *Karam v. State, Dept. of Environmental Protection*, 308 N.J. Super. 225, 235 (App. Div. 1998) further refined this analysis and, based on this decision, the most current *Penn Central* regulatory takings analysis considers the following:

> "(1) whether the regulation has deprived the owner of virtually all economically viable uses of the property, (2) whether the property owner had any distinct investment-backed expectations at

> the time of acquiring the property that were destroyed by the force of the regulation, and (3) whether the interest claimed to have been "taken" was vested with the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance."
>
> [*Karam*, 308 N.J. at 235].

Notably, *Karam* clarified the *East Cape May* first element from a denial of "economically viable use" to a deprivation of "***virtually all*** economically viable uses." Thus, if the Court does not find a total deprivation of economic uses, or a categorical taking, it may still find that a regulatory taking occurred if the owner was deprived of virtually all of the property's viable economic uses as long as the other elements are satisfied.

A. <u>The Trial Court erroneously held that the DEP permit denial has not deprived Plaintiffs of virtually all economically viable uses.</u>

Deprivation of virtually all economically viable use is the first element under a *Penn Central* regulatory takings analysis. It is true that a diminution of land value by itself does not constitute a taking. *Gardner* at 125 N.J. 210. However, when looked at in context with reasonable investment-backed expectations and the diminution is extreme, (i.e. almost 100%, or, in the words of the *Lucas* footnote 8- a deprivation of value "one step short of complete"), courts will find that a property has been deprived of virtually all economically viable use and a regulatory taking has occurred.

In this matter, if one takes the neighbor's purchase offer of $14,500.00, which is the offered value of the land as-is with the regulation in effect, and compares it with the minimum $578,000.00 value if developed[2], then there has been more than a 97.5% diminution in value of the land. The State maintained that $16,500.00 is the highest current fair market value. *See* Pa127. *See also* T7-23. The Court found that the value of the property was somewhere between $10,000 to $16,000. *See* Pa34. If one uses the State's figure, there is approximately a 97% diminution in value.

In footnote 8 of the *Lucas* decision, the Court found a 95% diminution as "one step short of complete" of total deprivation, and a value that could result in a taking under a *Penn Central* analysis. 505 U.S. at 1019. Thus, surely a 97% diminution could result in a taking if all the *Penn Central* elements are met. In fact, the State has not, nor can it, argue that a 97% diminution of value is not indicative of a deprivation of *virtually all* economic viable uses.

A 97% diminution of value should in itself suffice to meet the first element of the *Karam* and *Penn Central* analysis; there has been a deprivation of virtually all economically viable use of Plaintiffs' property. This is exactly the type of situation contemplated by footnote 8 in *Lucas*.

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[2] Which is a three year old figure.

B. The Trial Court erroneously held that Plaintiffs did not have distinct and reasonable investment-backed expectations.

The State argued below and the Trial Court found that Plaintiffs' investment-backed expectations are limited to the $726.00 that they actually invested to purchase the tax sale certificate for the property. *See* Pa39. *See also* T5-3. The State cited *Tahoe* as authority for this proposition, but conveniently omitted a specific page citation. This is because *Tahoe* never sets forth a rule that an investor's expectation is limited to the amount that he or she invested; no reported case has apparently ever stood for such a novel proposition. Indeed, why would anyone ever invest in real estate or anything else, if their expectation was that the property would never have a value that exceeds the purchase price?

The State repeatedly tossed around the purchase price of $726.00 in order to divert the Court from the proper issue: what were the Plaintiffs' reasonable investment-backed expectations? The answer is very simple: In his answers to interrogatories, Mr. Breitinger, a deceased former Plaintiff, stated that he "expected to develop the property in the same manner, and to the extent as every other property owner has been permitted to do." Pa73. That expectation was to develop it residentially as "[j]ust about every other lot that surrounds the body of water, if not every other lot, is developed with residential construction." *Id.* In addition, Mr. Breitinger reiterated his intent in a Certification dated August 15, 2000. *See* Pa743. The Trial Court erroneously held that Mr. Breitinger's belief was not reasonable. *See* Pa40.

An expectation is not necessarily indicated by or limited by a purchase price and the State's inferences from

a low purchase price cannot overcome the sworn statement as to Plaintiffs' intent. In *East Cape May*, the Court found that the plaintiffs had distinct investment-backed expectations, and in so doing relied on the plaintiffs' assertions that they always planned on developing the subject parcels. *See East Cape May*, 300 N.J. Super at 329, 337. Likewise, the Trial Court should have relied on Mr. Breitinger's sworn assertion.

Further, even the State's expert concluded in his report that "[t]he neighborhood is approximately 98% developed." Pa140. Also, Karl Braun of the DEP agreed that the area is heavily developed with upscale homes. *See* Pa576. It was therefore reasonable that Plaintiffs would have expected to be able to build on their lots based on their visual assessment of the vicinity. In *Lucas*, the Court noted that the plaintiff's "intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single family residences." 505 U.S. at 1008. Similarly, the Plaintiffs in this matter reasonably expected to be able to build a residence on their property based on their visual assessment of the neighboring properties.

In *Karam*, the plaintiffs were unaware of the prohibition against their expected use of erecting a dock and relied on their riparian grant and the fact that neighboring properties had docks. 308 N.J. Super. at 231. That Court noted that "the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development." *Id.* at 242. The Trial Court apparently agreed with the State's contention that *Karam* was decided on the basis of the plaintiffs having constructive notice; this is completely

erroneous. *See* Pa36. In fact, the *Karam* court found that the plaintiffs could not have had reasonable expectations because their predecessors in title never had the absolute right for the intended use of constructing a dock. In contrast, the immediate predecessor in title to the Plaintiffs in this matter purchased the subject property in 1953, *see* Pa746, long before contemporary environmental laws went into effect, and therefore had every right to construct a residence on the property. Under *Karam*, this right should have passed to Plaintiffs despite their constructive "knowledge of the impediment to development." 308 N.J. Super. at 242. Accordingly, the Trial Court erred when it found that Plaintiffs did not have a reasonable investment-backed expectation to residentially develop the property.

Indeed, the Trial Court agreed in a previous decision in this matter that "Plaintiffs' development rights are received from the predecessor in title and Plaintiff can proceed to act on those rights to the same extent as the predecessor in title." *See* Pa834. The Trial Court went on to note that these rights do not necessarily mean that the Plaintiffs share the same investment-backed expectations as the predecessor in title. *See id.* This is correct; however the two are inextricably intertwined. The Trial Court decided in accordance with the vast United States and New Jersey case law decisions that a plaintiff has the same rights as his predecessor. *See Nollan vs. California Coastal Commission*, 483 U.S. 825, 833 n. 2 (1987) (holding that current property owners are transferees of the predecessor's full right to the property so that the owners' rights are not diminished by their having acquired the property after adoption of regulations which affect the taking); *East Cape May*, 300 N.J. Super. at 337 (stating,

"East Cape May is entitled to assert whatever development its predecessors would have had"); and *Moroney vs. Mayor and Counsel of the Borough of Old Tappan*, 268 N.J. Super. 458, 465 (App. Div. 1993) (holding that "the Plaintiffs stand in the shoes of their predecessors in title"). *See also* Pa36. It must then follow that a plaintiff can reasonably expect to be able to utilize his property in the same manner that his immediate predecessor could, and thus a plaintiff's distinct investment-backed expectations are linked to an immediate predecessor's developmental rights, as the *Karam* court indicated. Logically, development rights are a large subset of investment backed expectations.

The State spent a significant amount of time arguing that the Plaintiffs could not have had distinct investment-backed expectations to build a residential lot on the subject property and the Trial Court erroneously accepted the State's arguments. *See* Pa37-40. *See also* T6-2. However, the State's arguments are unsupported and erroneous interpretations of the law, mixed with tenuous factual inferences. First, the State argued and the Trial Court found that at the time the property was purchased Plaintiffs were prohibited from developing a house on the lot, therefore Plaintiffs could not establish a reasonable, investment-backed expectation to undertake the residential development it desired. Pa39. Constructive notice is not determinative, as explained above, because Plaintiffs stand in the shoes of their immediate predecessor. If the immediate predecessor had developmental rights, the Plaintiffs can reasonably expect to have these same rights

despite the regulations currently in effect.[3] *See Karam*, 308 N.J. Super at 242.

The State also made the unsupportable argument and the Trial Court found that a plaintiff's expectation is limited to the amount invested. Pa39. *See also* T5-7. However, no case ever supported this novel contention and, respectfully, it is contrary to logic: people normally expect to ultimately receive more than they invest which is why they elect to invest at all.

Finally, the State argued and the Court found that the property's physical limitations and low price should have clued Plaintiffs in on the undesirability of the lot and, therefore, it is unreasonable that they would have expected to build a residence on it. *See* Pa39. *See also* T5-15. However, the property's low price was not indicative of its full value. It was merely indicative of the amount of taxes that were unpaid on the property. Moreover, the State never rebutted Plaintiffs' appraisal in the amount of $578,000.00 if residentially developed.

In sum, Plaintiffs have shown that at the time of purchase there was a reasonable and distinct investment-backed expectation to build a residence on the subject property. They stepped into the shoes of their immediate predecessor in title, who had the right to develop his property, and therefore Plaintiffs could reasonably have expected to be able to develop the subject property into a residential lot. This expectation was buttressed by a visual inspection of the surrounding properties. Plaintiffs' expert and the State's expert both opined that such an expectation was

[3] Plaintiffs are unaware of any New Jersey or United States case that has ever held to the contrary.

reasonable and Mr. Breitinger provided a sworn statement as to his intentions with regard to the property. All of the above affirmatively establishes that Plaintiffs had a distinct and reasonable investment-backed expectation to develop their property and the Court should thus find that the Trial Court erred in finding that the second element under *Karam* and the *Penn Central* analysis was not established.

C. The property interest in question is vested in the owner and cannot be regulated by the State under common law nuisance.

There has never been a claim by the State that Plaintiffs' proposed use constitutes a common law nuisance and the Trial Court specifically did not address this argument in its decision. However, Plaintiffs will briefly address this issue since it is the third criterion of the *Penn Central* analysis.

Plaintiffs wish to build a residential property on the subject parcel; there is no nuisance here. In fact, the State has never asserted that this would be prohibited under common law.

In *Karam*, the Court decided that "the DEP does not claim that the proposed use of the riparian land, erection of a dock, constitutes a common law nuisance that may be proscribed by the State. Thus, our inquiry focuses on the first two factors." *Id.* at 235. We respectfully submit that since the State never claimed it can regulate the property as a nuisance, the Court determine that there is no nuisance and that this element has been satisfied in favor of Plaintiffs.

## CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court reverse the decision of the Trial Court granting Summary Judgment in favor of Defendant, State of New Jersey, and that the Court remand this case with instructions to enter judgment for the Plaintiffs.